Thank you for your letter of 16 July about the Data Retention and Investigatory Powers Act 2014. I am grateful for your Committee's ongoing consideration of the issues covered by this important legislation. I will address each of the points raised in your letter in turn.

Summary of safeguards governing retention of and access to communications data

It is important to note at the outset that the Court of Justice of the European Union (CJEU) judgment was about the EU Data Retention Directive (the Directive) and not UK domestic legislation.

In relation to the Directive, the judgment made the following points: the scope of data retention was too broad; no consideration was given as to whether all data needed to be retained for the same length of time; the Directive contained no protections to safeguard retained data; and access to retained communications data should be subject to prior authorisation by an independent authority or court.

However, the CJEU also recognised – explicitly – the importance of data retention in preventing and detecting crime. Crucially, the judgment did not take into account the many safeguards in our domestic regime. As you suggested in your letter, many of the Court's concerns are already addressed in the UK's domestic legislation and the new legislation also seeks to respond to elements of the judgment, in order to ensure that UK law is compliant with European Charter rights.

Specifically, the existing safeguards in the Regulation of Investigatory Powers Act 2000 (RIPA) include:
• Ensuring that only bodies approved by Parliament can access communications data and only for specific statutory purposes. The type of data is also limited by public authority, so that only certain bodies can access the more intrusive traffic data.

• The internal authorisations regime that ensures that data can only be accessed by these bodies where it is necessary and proportionate to do so for a specific investigation. Requests are approved by a senior officer, of a rank specified by Parliament, who should be independent of the investigation, and are processed by a separate guardian and gatekeeper, who must be formally accredited. This system was examined in detail by the Joint Committee on the Draft Communications Data Bill and they were satisfied that “the current internal authorisation procedure is the right model”. Senior EU Commission officials have observed that our access and oversight arrangements compared favourably with those in other countries.

• Oversight by the independent Interception of Communications Commissioner, who conducts robust inspections of all public authorities that access data and publishes an Annual Report.

• An avenue of complaint to the Investigatory Powers Tribunal for individuals if they think the powers have been used unlawfully.

The Data Retention and Investigatory Powers Act 2014 (DRIPA) adds to these safeguards by ensuring that:

• Before issuing retention notices, Ministers will need to consider necessity and proportionality in the context of the statutory purposes in RIPPA, such as preventing or detecting crime, national security, public safety etc.

• The content of the new notices will be far more specific e.g. setting out the data categories and services this retention applies to. This ensures that the data retained subject to a notice issued by the Secretary of State must be proportionate to the requirements of law enforcement.

• Access to data retained subject to a notice may only be via a request under RIPPA, a court order or judicial authorisation, or another means approved by Parliament. This will prevent its access via an information gathering provision in any other legislation, which may be subject to less stringent safeguards.

• The scope of data that may be subject to a notice will, as at present, be limited to a strict list of data types. This will be identical to the existing list in the Data Retention Regulations 2009.

• There will be a maximum, rather than absolute, retention period of 12 months – data may be retained for less if it is not necessary or proportionate to keep it for longer.
The Data Retention Regulations 2014, which are currently under consideration by Parliament and should receive approval prior to Recess, further add to these safeguards:

- We will create a Code of Practice on Data Retention, putting existing best practice guidance on a statutory footing.

- There will be a clear requirement for the Secretary of State to keep notices under review.

- Data security requirements will be set out in notices, ensuring that data is properly protected and destroyed as appropriate. These will be enforceable.

- The Information Commissioner’s duties will be clarified, so that he oversees all relevant aspects of data retention.

- All of the safeguards in the existing legislation will be extended to data retained subject to the separate regime in the voluntary Code of Practice under the Anti-terrorism, Crime and Security Act 2001.

The Government also considers that communications data relating to certain kinds of contact can be particularly sensitive. We intend to bring forward amendments to the Acquisition and Disclosure Code of Practice to make this clear – that communications data that discloses the contact between persons in certain professions (such as lawyers or journalists) and those they are advising should require particularly sensitive consideration as part of the authorisation process. We do not, however, accept that communications data itself is subject to any form of professional privilege – the mere fact of a call or contact itself does not disclose any of the advice concerned.

The CJEU also noted that the Directive does not require that the data be retained within the EU. The notices to providers that require them to store data under the new legislation will specify the requirements for the storage of data. This may include restrictions on the location of retained data. Any data retention will be subject to the requirements in the Data Protection Act 1998. The Eighth Data Protection Principle provides that personal data should only be processed outside the EU if appropriate controls are in place.

The Government has given the judgment detailed consideration and believes that the safeguards outlined above ensure a data retention and access regime that is compatible with EU Charter Rights and the European Convention on Human Rights.

The replacement of the Independent Reviewer of Terrorism Legislation

In your letter you asked about a public consultation on the replacement of the Independent Reviewer of Terrorism Legislation. Given that primary legislation will be required to establish the Board, Parliament will have the opportunity to determine the details of the Board (including its composition and powers) and to ensure that the new Board is as effective as possible.
The current Independent Reviewer of Terrorism Legislation, David Anderson has been consulted on the proposal to create the Independent Privacy and Civil Liberties Board. I welcome the approach he takes in comments he has set out on his website:

"The proposals helpfully adopt two ideas I have previously advanced: that the scope of review should extend to the full range of anti-terrorism statutes, and that rather than be tied to a fixed obligation to review everything every year, the reviewer should choose which topics to cover after annual consultations with the Home Secretary and relevant parliamentary committees.

The idea of a committee to perform the functions of independent review has been advanced by others, notably my Special Adviser, Professor Clive Walker. It appears to have gained new momentum (and a new name) from the Privacy and Civil Liberties Oversight Board, which after a number of false starts produced valuable reports on US surveillance programmes in January and July 2014. The advantages of a committee over an individual include a wider range of expertise and an ability to share the burden of work, though the latter at least could be ensured by the simpler and cheaper solution of giving the Reviewer an assistant…

Reform to the office of Independent Reviewer is welcome, and a Board if properly constituted could bring advantages. But the wrong decisions could easily reduce the value of the current role, as it has evolved over 35 years. I would encourage the Government to consult as widely as possible on its proposals, including with the parliamentary Committees who are among the principal users of the Independent Reviewer’s reports."

Yours sincerely

[Signature]

Rt Hon Theresa May MP